LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 14 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

1968

No. [redacted]100

DARGAN SUTHER,

Petitioner,

versus

CITY OF MIDFIELD, INC., ET AL,

Respondent.

PETITION FOR WRIT OF CERTIORARI

DARGAN SUTHER, Pro Se
816 South 20th St.
Birmingham, Alabama

INDEX

Page

Statement of Case 1

Specification of Errors 3

Argument 4

Conclusion 12

Cases Cited

City of St. Louis v. Galt, 179 Mo. 8, 77 S. W. 876 4

Connor v. City of Birmingham, 36 Ala. App. 494, 60 So. (2nd) 474, cert. den. 257 Ala. 588, 60 So. (2nd) 479 ..... 5, 10

District of Columbia v. Green, 29 App. D. C. 296 4

Kahalley v. State, 254 Ala. 482, 48 So. (2nd) 794 ..... 5, 8

McHenry v. Ford Motor Co., C. A. Mich. 269 F. (2nd) 18 12

People v. Cook County, 221 Ill., 493, 77 N.E. 914 9

Southern Railway Co. v. Commonwealth of Virginia, 205 Va. 114, 135 S. E. (2nd) 160 7

Treatise

2 Moore's Federal Practice (2nd Ed.), Section 12.08 11

3 American Jurisprudence 2d, Agriculture, Section 45 12

Statutes

Section 211, Constitution of Alabama 8

Appendix

Ordinance No. 65, City of Midfield 14

Opinion U. S. District Court 19

Opinion U. S. Court of Appeals for Fifth Cir. 21

Judgment 22

IN THE
SUPREME COURT OF THE UNITED STATES

No.

DARGAN SUTHER,

Petitioner,

versus

CITY OF MIDFIELD, INC., ET AL,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully represents as follows:

1. This is a petition from a judgment entered against petitioner by the U. S. Court of Appeals (5th Cir.) on February 26, 1968. This is an action under the Fourteenth Amendment to the Constitution of the United States, Section one. Jurisdiction is provided for under 42 U.S.C.A. section 1983 and under the Federal Declaratory Judgments Act, 28 U.S.C.A. section 2201. Jurisdiction is also provided under 28 U.S.C.A. section 2101 for writ of certiorari to the Supreme Court.

STATEMENT OF THE CASE

On the first day of March, 1967 the petitioner received a letter from the respondent which stated that Ordinance No. 65 of the city provided that:

> ' "it shall be the duty of such owner, proprietor, or person in charge of any lot, place or premises in the City to keep or maintain such property free from weeds, *shrubs, undergrowth,* etc. which are higher than six inches." ' (R. p. 30) (Emphasis added).

Actually the ordinance was misquoted in this letter for nowhere in the ordinance is there found any language as set out in the letter as quoted and the words "shrubs and undergrowth" are not even found in the ordinance.

The petitioner on March 7, 1967, filed suit asking for a declaratory judgment. In substance the petitioner averred that the ordinance was unreasonable in that the ordinance used the size of a six inch weed to create a presumption of what kind of weed would be favorable to the harboring of mosquitoes. Also, petitioner averred that the ordinance was vague and uncertain in that no reasonable and ascertainable standard of conduct was set forth in the ordinance so as to put him on notice as to what constitutes a criminal offense under the ordinance. Petitioner further averred that part of the ordinance providing for the levy of a tax on his property was not in proportion to the value of his property, thereby making an unequal application of the law against the petitioner.

The respondent filed a Motion for Summary Judgment on May 9, 1967, the Court entered an order granting this Motion.

In the evidence there was undisputed testimony to show that the definition of a weed is vague. Evidence was on record to show that the size of a six inch weed had no reasonable relation to its harboring a mosquito.

In view of the undisputed testimony and the attempted mis-application of the ordinance the District Court denied petitioner the relief prayed for.

SPECIFICATION OF ERRORS

I. The Court erred in holding that the ordinance No. 65 of the City of Midfield was not vague, indefinite and uncertain so as to be violative of the Fourteenth Amendment in that no reasonable and ascertainable standard of conduct was set forth in the ordinance so as to put a person on notice of what constitutes a criminal offense.

II. The Court erred in holding that the ordinance No. 65 was not an unequal tax on the property of the petitioner.

III. The Court erred in holding that the ordinance was not an unreasonable regulation in that the size of weeds did not provide a reasonable relation to the object of the ordinance, i.e., weeds harboring mosquitoes.

IV. The Court erred in holding that the Motion for Summary Judgment was due to be granted because the Complaint for purposes of considering the Motion is taken as true.

ARGUMENT

SPECIFICATION OF ERROR I

A search of the cases reveals that in *District of Columbia v. Green,* 29 App. D. C. 296, the court upheld an ordinance wherein weeds of more than four inches high were not allowed to grow. In this case there was not any contention as to the vagueness of the ordinance nor any contention as to the relation of the size of a weed to the object of the ordinance.

In the case of *City of St. Louis v. Galt,* 179 Mo. 8, 77 S. W. 876, the court had before it a conviction under a weed ordinance wherein weeds of one foot were not allowed to grow. In that case the ordinance defined a weed as follows:

> "The word 'weeds' as used herein shall be held to include all rank vegetable growth which exhale unpleasant and noxious odors, and also high and rank vegetable growth that may contain filthy deposits."

It can be seen that the objection of this ordinance is to eliminate noxious and filthy weeds. Also to be noted is the fact that no issue of vagueness was presented in this case nor any issue of the size of a weed with relation to the object of the ordinance.

The above cases while somewhat in point factually do not have as the basis of their holding any of the issues presented by this petition, therefore, while these

cases are informative the appellant contends that the object of the ordinance in this case is the harboring of mosquitoes and not the regulation of weeds.

The ordinance in this case is vague, uncertain and indefinite as to be violative of the Fourteenth Amendment. In *Kahalley v. State,* 254 Ala. 482, 48 So. (2d) 794, the court stated:

> "In enacting a criminal statute, there is an obligation on the State to so frame it that those who administer it and those to whom it is to be administered may know what standard of conduct is intended to be required and legislation may run afoul of the due process clause because of a failure to set up any sufficient guidance to those who would be law-abiding, or to advise a defendant of the nature and cause of an accusation he is called on to answer, or to guide the courts in the law's enforcement."

In the case of *Connor v. City of Birmingham,* 36 Ala. App. 494, 60 So. (2d) 474, cert. den., 257 Ala. 588, 60 So. (2d) 479, the court reviewed the above case of *Kahalley v. State* and clearly stated the above rule.

In this case it has been shown that the definition of a weed is vague in that any plant growing where it is not wanted may be considered a weed and where a plant is located may depend on whether it is a weed or not. From this it can be determined that the "place" and not the "size" of the plant is the basis of calling

the plant a weed. From a review of the exhibits of letters offered by the petitioner it will be noted that exhibits H-M use the terms "weeds, shrubs and undergrowth and etc." The words "weeds, shrubs and undergrowth and etc." are quoted to represent them as part of the ordinance which is not the case. In these letters it can be seen the city is expressing the *object* of having a "beautiful city", "a clean, unlittered city." Also the city expresses attention to high grass and underbrush with snakes and rats and in which letter the city represented that ordinance No. 65 made unlawful "any weeds or underbrush to grow to such heights so as to wrongfully affect the health and safety of other persons"; this is indeed a misrepresentation of the ordinance and indicates the vagueness of the ordinance since the city had to add to its content in the above letter.

On another occasion the city expressed its concern arising out of a complaint about "high grass". In another occasion the city expressed concern over complaints about high grass and weeds and that several large snakes had been killed and beds of snake eggs had been found. From the above it can be seen that the city has misquoted and misrepresented the ordinance and that the ordinance has been used to correct littered conditions, snake eggs, rats, this indeed covers many situations and if the ordinance clearly states that people shall keep their property "free of any growth of weed favorable to the harboring of mosquitoes" it must be clear that the above letters show that the ordinance has been abused and that there is vagueness associated with its construction by the city in that they

have used it for so many different objects and reasons other than conditions favorable to the harboring of mosquitoes. In the case of the letter sent to Mr. Suther the city didn't even explain its reason to use the ordinance. Clearly the petitioner would have to guess what manner of conduct on his part would be necessary to avoid offending this criminal ordinance.

The object of the ordinance being to abate mosquitoes cast on the petitioner a broad definition of weeds and sweeps into its language conduct that is innocent i.e. common sense tells you that more than the size of a plant is important for its capacity to harbor mosquitoes, indeed the place of the plants as near water and breeding grounds for mosquitoes is more important than the mere size of a plant. In this case where the ordinance punishes landowners who are not near water and who do not have conditions favorable to mosquitoes it is easy to see that the ordinance makes criminal conduct and situations which by their nature are not in fact related to the object of the ordinance.

To further support the view that the word "weed" is vague the dissenting opinion of Whittle, J., in Southern Railway Co. v. Commonwealth of Virginia, 205 Va. 114, 135 S E (2nd) 160, is informative because the view was taken that the word "weed" was vague and this shows that learned men can differ on the meaning given to this word and it speaks for itself that if learned men can differ on the meaning can it be reasonably expected that the man in the street could not also be unsure as to its meaning especially when the

word is an important element in the establishment of a crime.

Therefore petitioner submits this ordinance is vague as to be violative of the Fourteenth Amendment and further that the ordinance is arbitrary and fixes no ascertainable standard whereby the public may be governed and it further sweeps within its influence conduct neither evil in nature nor detrimental to the public interest, which can not be proscribed as criminal. *Kahalley v. State*, supra.

Petitioner submits that the applicable law for the above argument is found in the Fourteenth Amendment to the Constitution of the United States, Section One, providing that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

SPECIFICATION OF ERROR II

The levy provided under this ordinance is an unequal application of the law against the petitioner. Section 211 of the Constitution of Alabama provides:

> "All taxes levied on property in this state shall be assessed in exact proportion to the value of such property, . . ."

The ordinance in this case levies against the property of the petitioner on the basis of the expense necessary to execute the ordinance and in no way assesses

the levy in proportion to the value of the property, Section Nine.

Such a law was held invalid in *People v. Cook County*, 221 Ill. 493, 77 N. E. 914, wherein the court stated:

> "This act violates . . . the Constitution of this state, which provides that taxation shall be uniform and in proportion to the value of the taxable property, because the revenue which is provided for the purpose of enabling the county to discharge the duty imposed of destroying noxious weeds is not to be raised by levying a tax according to valuation, as provided by the Constitution, but is to be levied only upon the property from which the noxious weeds are removed and without regard to the value of such property."

To allow this assessment to be made upon the appellant would be to deny him equal protection of the law because the application of the ordinance would be an unequal tax upon the appellant. In as much as the law in Alabama provided for taxation in proportion to the value of the property the case of *People v. Cook County* is authority for appellant's contention.

SPECIFICATION OF ERROR III

The ordinance in this case creates an unreasonable standard as to what type of growth is favorable to the harboring of mosquitoes. The object of the ordinance

in this case is to abate things favorable to the harboring of mosquitoes. Therefore the object of the ordinance is the abatement of mosquitoes. The ordinance defines a six inch weed as a condition favorable to mosquitoes, section three.

The uncontradicted evidence before the court showed that there was no reasonable relationship between the size of a six inch weed itself and its attraction for mosquitoes.

Under the rule in the case of Connor v. City of Birmingham, supra, the regulation of weeds must have a reasonable relation to the object of the ordinance i. e. mosquitoes.

Also in *Connor v. City of Birmingham* is found the following:

> "Despite the broad discretion accorded municipal governing bodies in promulgation ordinances under their police power and the presumption of validity attaching to such acts, such power is not absolute. It is not to be exercised capriciously, but with regard to the circumstances, and *must* be reasonably related to the object sought to be accomplished." (Emphasis added.)

The petitioner submits that the ordinance in this case is unreasonable in that the presumption attached to a six inch weed bears no reasonable relation to mosquitoes. Further the ordinance makes a presumption

that a six inch weed is a nuisance thereby rendering anyone with weeds more than six inches guilty under the ordinance.

The evidence shows that the premises are considered a fire hazard. Also the property inspected by the health officer brought out evidence of weeds 30 inches high and goes on to show that the "condition of *these* (Emphasis Added) premises are such to constitute a place favorable to the harboring of mosquitoes and other pests." At the best this can be taken to mean that Mr. Suther's property in view of the above description is favorable to mosquitoes, but this was not the question raised by the complaint. The question was concerning the validity of an ordinance to create a presumption that a six inch weed is favorable to the harboring of mosquitoes. The uncontradicted evidence shows that there is no reasonable relation of a six inch weed to mosquitoes and therefore the presumption has no reasonable relation of the object of the ordinance.

SPECIFICATION OF ERROR IV

The court erred in that the Motion was improperly granted because the complaint states a cause of action. In Professor Moore's treatise the following is found:

> "For the purpose of the motion, the well pleaded material allegations of the complaint are taken as admitted." 2 Moore's Federal Practice (2d Ed.), Section 12.08.

It is apparent from a reading of the complaint that the appellant is entitled to some relief. Such relief being the right to know if his property may be taxed, his uncertainty of the various meanings of the ordinance and the uncertainty of prosecution under the ordinance.

In considering a motion for Summary Judgment the pleadings are to be construed in favor of the party opposing the motion and the court must take the view most favorable to the party opposing the motion, giving that party benefit of all reasonable inferences that may be drawn from the evidence. McHenry v. Ford Motor Co., C. A. Mich. 269 F. 2d 18.

CONCLUSION

The petitioner respectfully represents that the ordinance in this is being misused because from the letters in evidence the respondent misquoted and misrepresented the ordinance.

In 3 American Jurisprudence 2d, Agriculture, Section 45, is found the following:

> "Statutes requiring the removal or destruction of noxious weeds, being in derogation of the common law, should be construed strictly, however, and all ambiguous expression or doubtful points resolved in favor of the landowner."

The petitioner contends that this rule of construction is proper for this case.

The questions presented to this Court on this petition are not whether it is better to apply the ordinance against the petitioner, but whether under the law it is right, lawful and proper to do so. The Court of Appeals should be reversed and this Court should declare petitioner's rights under the ordinance as raised by this petition.

Respectfully submitted,

Dargan Suther

DARGAN SUTHER
816 South 20th St.
Birmingham, Alabama

CERTIFICATE

I certify that at the time of transmittal to the Clerk of this Court forty (40) copies of the foregoing Petition for the filing thereof, a like printed copy of such Petition was deposited in the U. S. Mail in an envelope properly addressed to the Honorable Norman K. Brown, Attorney for the Respondent, at his office and address last known to petitioner of Realty Building, Bessemer, Alabama and to which proper postage was used to convey the same.

Dargan Suther

Dargan Suther, PRO SE

APPENDIX

ORDINANCE NO. 65

AN ORDINANCE ENTITLED "AN ORDINANCE TO REQUIRE WEEDS TO BE CUT, OR OTHER THINGS OR CONDITIONS, FAVORABLE TO THE HARBORING OF MOSQUITOES OR OTHER INSECTS TO BE ABATED; TO PROVIDE THAT UPON FAILURE OF THE PROPERTY OWNER TO DO SUCH WORK, THE CITY TO DO SUCH WORK AT THE EXPENSE OF SAID OWNER, THE SAME TO BE A LIEN ON THE PROPERTY TO BE COLLECTED AS ANY OTHER DEBTS ARE COLLECTED, OR LIENS ENFORCED; TO DEFINE WEEDS FAVORABLE TO HARBORING MOSQUITOES; TO PROVIDE FOR NOTICE TO OWNER OR OCCUPANT TO REMOVE AND CUT SUCH WEEDS; TO PROVIDE FOR HEARING AND ASSESSMENT OF COSTS; AND TO PROVIDE FOR THE PENALTY OR VIOLATION THEREOF."

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIDFIELD, ALABAMA, AS FOLLOWS:

Section 1. Every person owning or having in charge any premises in the city, or its police jurisdiction, shall keep the same free of any growth of weeds favorable to the harboring of mosquitoes or other insects of like kind.

Section 2. Every growth of weeds described in the preceding section is hereby declared to be a nuisance.

Every person who shall allow any such growth of weeds to accumulate on the premises which such person owns or of which he is in charge, shall be punished as for a violation of this ordinance.

Section 3. Any growth of weeds more than six inches in height shall be deemed favorable to the harboring of mosquitoes or insects of like kind, within the meaning of this ordinance.

Section 4. Whenever any official of the city shall discover on any premises in the city any growth of weeds in violation of Section 1 of this ordinance, he shall give written notice by registered mail to the owner or person having such premises in charge, that such a condition does exist, and shall forthwith issue an order to such owner or person in charge of such premises requiring the same to be cut and removed. If the premises are in charge of a person other than the owner, then the notice shall be addressed to such person.

Section 5. If the owner or person having in charge any premises whereon there exists any growth of weeds in violation of this ordinance, shall fail to cut and remove the same within five days after the cutting and removal thereof has been ordered by the city, the street superintendent, by himself or employees of his department, or with prisoners, shall enter upon such premises and at the expense of such person shall proceed to cut and remove such weeds.

Section 6. The street superintendent is hereby di-

rected to keep an account of the expense of cutting and removing weeds, under the provisions of the preceding section, and to certify the same monthly to the City Council. The street superintendent shall keep separate accounts showing the total expense of cutting and removing weeds from each separate lot or premises, and shall report separately as to each piece of property wherefrom he has cut and removed weeds together with a description of the premises and the name of the owner or persons having the same in charge, and the total expense incurred in abating each such nuisance. If prisoners are employed in such cutting and removal, a reasonable charge for their labor shall be included in the expense to be charged against the property owner or the occupant of the premises.

Section 7. At intervals to be determined by the City Council, it shall cause to be made a list showing the names of the owners or persons who had in charge the premises from which weeds have been removed at the expense of such persons as provided in sections 5 and 6, together with a description of the property from which such weeds have been removed, and a statement of the amount of the expense as reported by the street superintendent, of cutting and removing the weeds from each such piece of property. If the names of the owners of such property are not known, same be stated as unknown.

Section 8. The City Council shall set a time and place when the persons mentioned in section 7 may appear and show cause, if any they can, why such ex-

pense should not be assessed against them and their respective premises, and shall cause such notice to be published one time in some newspaper published in the city, such publication to be made at least ten days in advance of the date fixed for such hearing.

Section 9. At the time and place fixed for the hearing, under the provisions of section 8, the City Council of the city shall proceed to hear and determine any objections that may be interposed to such assessments, and unless good cause shall be shown against the right of the City to assess the same, the city shall proceed to levy an assessment against such persons and their respective premises, from which weeds have been cut and removed, for the expense of cutting and removing such weeds.

Section 10. The assessment made under the provisions of section 9 shall be final, and the city shall have a charge and claim against such persons, and a lien on the property so assessed, for the amount of the respective assessments, which lien and charge it shall proceed to enforce and collect as any other debts are collected or liens enforced.

Section 11. All ordinances, or parts of ordinances, in conflict herewith are hereby repealed.

Section 12. Any person violating any provision of this ordinance shall on conviction be punished by fine of not less than $1.00 nor more than $100.00, or by imprisonment in the jail, or by hard labor for a period of not exceeding six months, or by both fine and im-

prisonment, at the discretion of the recorder or judge trying the case. Each day any violation of this ordinance shall continue shall constitute a separate offense.

Section 13. Should any phrase, clause, sentence, paragraph or section of this ordinance be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

Section 14. That this ordinance shall become effective immediately upon its adoption, approval and publication as required by law.

ADOPTED, this 10th day of June, 1961.

(Signed) RUTH GARNER
Clerk-Treasurer

APPROVED, this 10 day of July, 1961.

(Signed) ILLEGIBLE
Mayor

I certify that I have published the foregoing Ordinance No. 65 by posting a copy of the same in each of the following three public places, all of which are located within the corporate limits of the City of Midfield, on this 11th day of July, 1961:

1. Mayor's office
2. Midfield Apothecary
3. Midfield Food Center

(Signed) RUTH GARNER
Clerk-Treasurer

OPINION OF THE U. S. DISTRICT COURT

ORDER ON MOTION FOR SUMMARY JUDGMENT

(Number and Title Omitted)

Filed: May 17, 1967

This matter came on for hearing on the regular motion docket on April 28, 1967, upon the defendants' motion to dismiss. The parties were heard and the said motion, which will be treated as a motion for summary judgment, was taken under submission pending the filing of affidavits and counter-affidavits.

Subsequent to the hearing and on May 9, 1967, the defendants filed a formal motion for summary judgment together with supporting affidavits. The plaintiffs have filed counter-affidavits.

Upon a review of the proceedings herein and having duly considered the affidavits and counter-affidavits of the parties, the Court is of the opinion that the de-

fendants' motion for summary judgment is due to be granted.

It is, therefore, ORDERED, ADJUDGED and DECREED that the defendants' motion for summary judgment be and the same is hereby granted, and this action be and the same is hereby dismissed at the costs of the plaintiffs.

Done and Ordered, this the 16th day of May, 1967.

(Signed) H. H. GROOMS
United States District Judge

(SEAL)

OPINION COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24958

DARGAN SUTHER,

Appellant,

versus

CITY OF MIDFIELD, INC., ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

(February 26, 1968.)

Before BROWN, Chief Judge, GEWIN and WRIGHT,* Circuit Judges.

PER CURIAM: This is the second appeal in this case.[1] This Court, in affirming the dismissal of the complaint in the first appeal, held that Appellant had not adequately alleged a jurisdictional amount. Assuming that the jurisdictional prerequisites have now

---

*Of the District of Columbia Circuit, sitting by designation.

[1]See Suther v. City of Midfield, 5 Cir., 1966, 358 F.2d 740.

been met, we find that Appellant's contentions are without merit and the granting of Appellee's motion for summary judgment was correct.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24958

D. C. Docket No. CA 67-160

DARGAN SUTHER,

Appellant,

versus

CITY OF MIDFIELD, INC., ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before BROWN, Chief Judge, GEWIN and WRIGHT,* Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the

Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Dargan Suther, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 26, 1968

Of the District of Columbia Circuit, sitting by designation.
Issued as Mandate: March 19, 1968